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April 15, 1996

DELIVERED BY HAND

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20054

RE: IB Docket No. 95-59 - Pre-Exemption of Local Zoning Regulation of Satellite Earth Stations - Further Notice of Proposed Rulemaking - Proposed Rule 25.104(f) - Restrictive Covenants and Other Nongovernmental Restrictions

Dear Commissioners:

We are writing to express our concern about the potential adverse impact of the proposed rule preempting the enforcement of restrictive covenants or other non-governmental restrictions with respect to satellite antennae.

Our firm represents over 150 condominiums, co-operative housing associations, and homeowner associations in the metropolitan Washington, D.C. area. These associations (collectively known as "community associations") are located in both urban and suburban areas. The community associations which we represent include high-rise buildings, garden-style mid-rise buildings, attached townhouse dwellings, and single family detached dwellings.

Although there are some differences in the legal organization and operation between condominiums, co-operatives and homeowner associations, the legal documents establishing virtually all community associations empower the governing Board of Directors to regulate the physical appearance of the community. Additionally, in most community associations, the owner of an individual dwelling or lot is prohibited by restrictive covenants recorded in the local land records from making any change to the exterior of the dwelling or erecting any new structure without the prior approval of the Board of Directors.

While few associations have covenants or rules which expressly prohibit satellite antennae, most associations have covenants which require prior association approval for any physical change to the exterior appearance of the dwelling or lot.

The validity and enforceability of such architectural control restrictive covenants has long been recognized by the courts as a means of preserving the architectural character of a community and maintaining property values of the restricted properties. In Maryland, for instance, architectural covenants have withstood judicial scrutiny for over 100 years! See *Peabody Heights Co. v. Willson*, 82 Md. 186, 32 A. 386 (Md. 1895).

With that background in mind, please consider the following:

1. The prohibition of the proposed regulation is broader than contemplated by Congress. Although the text of Section 207 of the Telecommunications Act of 1996 directs the FCC to promulgate regulations to prohibit restrictions that "impair" a viewer's ability to receive video programming services through devices designed for over the air reception of direct broadcast satellite services, the House Committee Report states that this section of the statute is intended to pre-exempt enforcement of restrictive covenants which "prevent" the use of satellite receivers designed for receipt of DBS services. In light of the ambiguity of the term "impair", the legislative history should be given considerable weight.

Although Congress apparently wanted to preempt covenants which prohibit entirely the ability to receive direct broadcast satellite services, there is no indication in the legislative history that Congress intended to completely invalidate covenants or homeowner association rules which regulate the location or appearance of satellite antennae but do not prohibit such devices. Therefore, we suggest that the rule be limited to pre-exemption of covenants or rules which "prevent" the reception of video programming services through reception of direct broadcast satellite services.

2. The Commission should not extend the pre-exemption of covenants or rules to satellite antennae other than devices for reception of direct broadcast satellite services. With regard to satellite services, the text of the statute is very specific in directing the Commission to promulgate rules to prohibit restrictions pertaining to "devices designed for over the air reception of... direct broadcast satellite services." Additionally, the House Committee Report specifically "notes that the 'Direct Broadcast Satellite Service' is a specific service that is limited to higher power DBS satellites."

As the proposed rulemaking notice states, a DBS antenna is 18-inches in diameter. Yet, the text of the proposed rule would provide pre-exemption for satellite antennae of up to 1 meter -- more than twice the size of a DBS 18-inch antenna.

Accordingly, we suggest that the proposed rule eliminate reference to "less than one meter in diameter" and limit the pre-exemption to DBS antennae.

3. Just as recent advances in technology have allowed 18-inch DBS satellite antennae as an alternative to 8-foot C-Band antennae, future advances in technology may permit DBS antennae to be even smaller. Therefore, any rule should not create an entitlement to maintain a satellite antennae of 18 inches. Instead, the rule should be written to prohibit covenants or rules which prevent over the air reception of direct broadcast satellite services. If, in the future, direct broadcast satellite services can be received by a 6-inch antenna, Congress did not intend that there be protection for larger antennae.

4. The proposed rule is vague as to when a covenant or rule "impairs a viewer's ability to receive video programming service." What regulation of satellite antennae less than 1 meter in diameter is permitted? If an association requires a homeowner to camouflage or screen an antennae, is the homeowner's ability to receive video programming "impaired" because the homeowner must incur an additional expense? Unless the rule is clarified as to what constitutes impairment of the ability to receive video programming, there will likely be protracted and costly litigation between community associations and homeowners as to whether association regulation of these satellite antennae is prohibited by the rule.

5. The burden of showing that a homeowner's ability to receive video programming is impaired by the restrictive covenant or rule should be on the homeowner. Contrary to the approach taken in the proposed rule, there should be a presumption that the association covenant or rule is enforceable. Only the homeowner will have information and evidence that the ability to receive video programming is impaired.

Except where there is a complete ban on such satellite antennae, there is no basis to presume that association regulation of the appearance or location of the antennae would impair the ability to receive video programming. Yet, it would be extremely difficult, if not impossible, for the association to demonstrate that video reception is <u>not</u> impaired.

6. With regard to state and local government regulation, the notice of proposed rulemaking states that because Congress did not prohibit all regulation of DBS satellite antennae but rather only those that impaired reception, the Commission concludes that "accommodation of local concerns remains permissible under the statute."

Yet, with regard to restrictive covenants and homeowner association rules, the rule makes no provision for accommodation of the "local concerns" of community associations. Just as health and safety considerations are central to the exercise of state local government land use powers, aesthetic considerations are central to the exercise of community association architectural covenant powers. At a minimum, community associations should retain the power to regulate the aesthetic appearance of satellite antennae by requiring fencing, landscape screening or other camouflage to the extent such regulation does not prevent the ability of the homeowner to receive direct broadcast satellite services.

Thank you for the opportunity to comment on the proposed rule. Please include us on the mailing list in this proceeding.

Very cordially yours,

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